INDEX

CITATIONS

426-467—71—1

Cases—Continued

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1285

UNITED STATES OF AMERICA, PETITIONER

v.

DENNETH BASS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (App. 60–67) is reported at 434 F. 2d 1296. The opinion of the district court (App. 55–59) is reported at 308 F. Supp. 1385.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1970. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to January 29, 1971. The petition was filed on that date and was granted on March 29, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. App. (Supp. V) 1202(a) should be construed to prohibit any possession of a

firearm by a felon, without the necessity of proof that the possession was "in commerce or affecting commerce".

2. Whether, if so construed, the statute is constitutional as a valid exercise of congressional power under the Commerce Clause.

STATUTES INVOLVED

18 U.S.C. App. (Supp. V) 1201 provides:

> The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—
>
> (1) a burden on commerce or threat affecting the free flow of commerce,
>
> (2) a threat to the safety of the President of the United States and Vice President of the United States,
>
> (3) an impediment or a threat to the exercise of free speech and the free exercise of religion guaranteed by the first amendment to the Constitution of the United States, and
>
> (4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.

18 U.S.C. App. (Supp. V) 1202(a) provides in pertinent part:

> Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any po-

> litical subdivision thereof of a felony, * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. App. (Supp. V) 1202(c) provides in pertinent part:

> As used in this title—
>
> (1) "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country;
>
> (2) "felony" means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less * * *.

STATEMENT

1. Respondent was indicted in the United States District Court for the Southern District of New York on two counts charging him, as a previously convicted felon, with possession of firearms, in violation of 18 U.S.C. App. (Supp. V) 1202(a)(1). A third count charged him with carrying a firearm during the commission of a felony (the sale of a narcotic drug), in

violation of 18 U.S.C. (Supp. V) 924(c)(2). After a jury trial, respondent was convicted on the two counts alleging violation of Section 1202(a)(1), but acquitted on the third count. On February 19, 1970, he was sentenced to concurrent prison terms of fifteen months.

The evidence showed that on July 28, 1969, United States Treasury Agent Jordan, acting in an undercover capacity, went to respondent's home in the Bronx to purchase narcotics. Respondent directed Jordan to the basement where Jordan purchased narcotics from an unknown individual (App. 7–8). The following day Jordan returned to respondent's home and was admitted by respondent, who was holding a Baretta automatic pistol in his hand. Jordan purchased seven bags of heroin from respondent and left the premises (App. 8–10, 16, 18).

On July 30, 1969, Agent Jordan filed an affidavit with a United States Commissioner and obtained an arrest warrant for respondent and a search warrant for his apartment (see App. 14). Thereafter Jordan went to respondent's apartment accompanied by other agents. Jordan appeared at the front door alone and was let in by respondent, who took Jordan into the bedroom where the agent observed a sawed-off shotgun on a night table. At about this time, the other agents knocked at the door and announced themselves. Jordan opened the front door as respondent sought to flee out the rear exit, where he was apprehended by a waiting agent (App. 15, 27–28). A search pursuant to the warrant produced the shotgun, as well as the Baretta, which was under a bathtub (App. 23–24). The next day, after being warned of his rights, re-

spondent stated that he had recently purchased both firearms (App. 24–25).

It was stipulated at trial that on or about February 1, 1968, respondent had been convicted in the New York State Supreme Court of the felony of attempted grand larceny in the second degree, described in counts 1 and 2 of the indictment (App. 25–26). In his testimony, respondent admitted that the weapons found in his apartment belonged to him (App. 38).[1]

2. The indictment contained no allegation, nor was any proof introduced to show, that the firearms possessed by respondent had been "in commerce or affecting commerce".[2] Following his conviction, respondent moved to arrest the judgment on the ground that such an allegation was an essential element of the crime under 18 U.S.C. App. (Supp. V) 1202(a)(1). The district court denied the motion, holding that the statutory phrase "in commerce or affecting commerce" modifies only the adjacent term "transports" and not the preceding terms "receives" and "possesses." The court found this interpretation of the statute supported by its legislative history and the formal congressional findings expressed in Section 1201. Finally, the district court held that the statute as so construed was constitutional (App. 55–59).

[1] Respondent interposed no factual defense to the charges under Section 1202(a)(1). His defense at trial was directed to the count 3 charge under 18 U.S.C. (Supp. V) 924(c)(2) (which carries a mandatory minimum sentence of five to twenty-five years), on which he was acquitted.

[2] 18 U.S.C. App. (Supp. V) 1202(c)(1) defines "commerce" to mean interstate or foreign commerce.

426-467—71——2

The court of appeals reversed, ruling that, notwithstanding the grammatical context of the commerce phrase and the statute's legislative history, Section 1202(a)(1) should be construed to require an allegation and proof that the felon's possession had an effect on interstate commerce. The court reasoned that it would have been illogical for Congress to condition a transportation charge on the showing of a connection with commerce while exempting possession and receipt charges from the same showing—particularly since, in its view, transportation would necessarily involve receipt or possession. The court was also of the view that substantial constitutional doubts concerning the power of Congress to enact the statute would exist if the government's construction were accepted (App. 60–67).

SUMMARY OF ARGUMENT

A

Both the language and legislative history of 18 U.S.C. App. (Supp. V) 1202(a)(1)—punishing any convicted felon who "receives, possesses, or transports in commerce or affecting commerce" any firearm—suggest that Congress intended to prohibit convicted felons from possessing firearms without requiring proof in any individual case that the possession was "in commerce or affecting commerce." While the grammatical construction of the statute which we suggest is obviously not dispositive, the specific finding in the statute that possession of firearms by convicted felons constitutes a burden on interstate commerce and the remarks of the statute's sponsor, Senator

Long, on the floor of the Senate make clear that all possessions of firearms by convicted felons were intended to be banned.

The court of appeals rejected the construction, noting that it would be illogical for Congress to punish *all* receipts and possessions of firearms by the designated persons, but only those transportations which were in or affected commerce. While it may be difficult to rationalize the differing treatments of the offenses by Congress, an analysis of the federal gun control legislation existing at the time of the statute's consideration by Congress and of Title IV of the same legislation of which Section 1202(a)(1) was a part (as Title VII) shows that under the court of appeals' construction, Senator Long's statute would be almost totally redundant. The legislative history shows that Congress was well aware of the other gun control legislation and intended Section 1202(a)(1) to be a useful complement to it.

B

Any doubts about Congress' power under the Commerce Clause to enact Section 1202(a)(1) as construed by the government have been largely resolved by this Court's decision in *Perez* v. *United States*, No. 600, 1970 Term, decided April 26, 1971. Thus, it is clear that Congress has the power to prohibit a *class* of activities which affect interstate commerce, notwithstanding the fact that isolated instances within the class may have no provable effect on such commerce. Reference to the reports and statistics before Congress at the time it considered the instant statute

shows that Congress has a rational basis for concluding that possessions of firearms by convicted felons as a class constitutes a burden on interstate commerce.

ARGUMENT

I. THE LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 1202(a)(1) ESTABLISH THAT CONGRESS INTENDED TO PROHIBIT FELONS FROM POSSESSING FIREARMS WITHOUT REQUIRING PROOF IN ANY INDIVIDUAL CASE THAT THE POSSESSION WAS "IN COMMERCE OR AFFECTING COMMERCE"

The statute here at issue, 18 U.S.C. App. (Supp. V) 1202(a)(1), punishes any convicted felon who

> * * * receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm * * *.

The question is whether, in any particular case, the prosecution must show that possession or receipt of the firearm is "in commerce or affecting commerce." In our view, both the language and the legislative history of the statute support the construction that the government need not establish a connection with interstate commerce in each case. Our position both on construction and on the validity of the statute as so construed (which is argued in Point II, below) has been upheld by every court of appeals other than the court below that has considered the question—a total of four circuits. *United States* v. *Cabbler,* 429 F. 2d 577 (C.A. 4), certiorari denied, 400 U.S. 901; *United States* v. *Mullins,* No. 15101 (C.A. 4), decided November 3, 1970, pending on petition for a writ of certiorari, No. 6166, 1970 Term; *Stevens* v. *United States,* No. 20,488

(C.A. 6), denied March 22, 1971; *United States* v. *Synnes,* 438 F.2d 764 (C.A. 8); *United States* v. *Daniels,* 431 F.2d 697 (C.A. 9); *United States* v. *Crow,* No. 25,850 (C.A. 9), decided March 24, 1971.

Turning to the language of the statute, the punctuation suggests that the phrase "in commerce or affecting commerce" modifies only the verb "transports" and not "receives" or "possesses." As noted by the Sixth Circuit in *Stevens, supra,* the contrary meaning urged by respondent would be supported only if there were a comma following the word "transports" thus indicating an intent that the succeeding phrase modify all of the preceding verbs. As the *Stevens* court stated (slip op. at 3):

> * * * The absence of a comma after the word "transports" becomes more significant in light of the draftmen's use of a comma immediately prior to the phrase "after the date of enactment of this Act" to indicate that this phrase was intended to modify each of the three words "receives," "possesses," and "transports."

While punctuation alone is not dispositive of the issue here, the same construction is supported by the express finding of Congress, set forth in Section 1201, *supra,* p. 2, that "the receipt, possession or transportation of a firearm by felons" constitutes "a burden on commerce or threat affecting the free flow of commerce." This finding would have been wholly unnecessary and without practical effect if Congress had intended to require proof under Section 1202 (a)(1) that each receipt or possession of a firearm by a felon was in or affected interstate or foreign com-

merce. The logical explanation for the incorporation of the finding into the statute is that Congress was seeking to establish a basis for prohibiting any receipt or possession of firearms by felons, not just specifically those "in or affecting commerce." Similarly, the further findings that the receipt, possession or transportation of a firearm by a felon endangers the safety of the President and Vice President, the First Amendment rights of free speech and religion, and the continued and effective operation of the governments of the States and of the United States reflect an intent to prohibit all receipts and possessions of firearms by felons.[3]

Reference to the legislative history of the statute leaves little doubt that the construction suggested by the wording of Section 1202(a)(1) and supported by the findings contained in Section 1201 is the correct one. The present statute, 18 U.S.C. App. (Supp. V) 1201–1203, was enacted as Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90–351). Title VII was introduced by Senator Long on the floor of the Senate on May 17, 1968, and was agreed to by the Senate by a voice vote on May 23 without having been referred to any committee.[4] 114

[3] The findings contained in Section 1201 do not differentiate between receipt, possession and transportation and thus offer no explanation why the words "in commerce or affecting commerce" were inserted after the word "transports" in Section 1202(a)(1). See discussion at pages 14–17, *infra*.

[4] Title VII was introduced as an amendment to S. 917. 114 Cong. Rec. 13,867. After the amendment passed, the Senate voted to amend H.R. 5037, a crime bill previously enacted by the House of Representatives, by deleting the House language and substituting the text of S. 917. 114 Cong. Rec. 14,798. As

Cong. Rec. 14,775. Accordingly, there were no legislative hearings and no committee report with respect to the statute; the entire legislative history is contained in a few pages of the Congressional Record and consists primarily of an explanation of the statute by its sponsor, Senator Long.[5] Senator Long made it quite clear on more than one occasion what his proposed legislation was meant to accomplish. In introducing his amendment, he commented (114 Cong. Rec. 13,868–13,869):

> I have prepared an amendment which I will offer at any appropriate time, simply setting forth the fact that anybody who has been convicted of a felony * * * is not permitted to possess a firearm * * *.
>
> It might be well to analyze, for a moment, the logic involved. When a man has been convicted of a felony, unless—as this bill sets forth—he has been expressly pardoned by the President and the pardon states that the person is to be permitted to possess firearms in the future, that man would have no right to possess firearms. He would be punished criminally if he is found in possession of them.
>
> * * * * *
>
> So Congress simply finds that the possession of these weapons by the wrong kind of people

amended, H.R. 5037 was returned to the House and approved on June 6, 1968 without further committee study. 114 Cong. Rec. 16,300. The legislation, entitled the Omnibus Crime Control and Safe Streets Act of 1968, was signed into law by the President on June 19, 1968.

[5] The entire legislative history of the sections involved is set forth as an appendix to the majority's opinion in the *Stevens* case, *supra*.

> is either a burden on commerce or a threat that affects the free flow of commerce.
>
> You cannot do business in an area, and you certainly cannot do as much of it and do it as well as you would like, if in order to do business you have to go through a street where there are burglars, murderers, and arsonists armed to the teeth against innocent citizens. So the threat certainly affects the free flow of commerce.[6]

Thus, mere possession by a convicted felon was to be prohibited, Congress having determined that such possession placed a burden on interstate commerce. This intended effect of the legislation is further reflected by a colloquy between Senators Long and McClellan just prior to the amendment's passage (114 Cong. Rec. 14,774–14,775):

> Mr. McClellan. I have not had an opportunity to study the amendment. * * * The thought occurred to me, as the Senator explained it, is that if a man had been in the penitentiary, had been a felon, and had been pardoned, without any condition in his pardon to which the able Senator referred, granting him the right to bear arms, could that man own a shotgun for purposes of hunting?
>
> Mr. Long of Louisiana. No, he could not. He could own it, but he could not possess it.

---

[6] Senator Long also referred to the need to protect the life of the President and the Vice President and the need to protect citizens in the exercise of their First Amendment right to free speech—referring specifically to Rev. Martin Luther King, who had been assassinated some two months before—as bases for congressional power to outlaw possession of weapons by certain persons. 114 Cong. Rec. 13,869.

> Mr. McClellan. I beg the Senator's pardon?
>
> Mr. Long of Louisiana. This amendment does not seek to do anything about who owns a firearm. He could not carry it around; he could not have it.
>
> Mr. McClellan. Could he have it in his home?
>
> Mr. Long of Louisiana. No, he could not.

Summing up just before the voice vote on the amendment, Senator Long noted (114 Cong. Rec. 14,775):

> This amendment would proceed on the theory that every burglar, thief, assassin, and murderer is entitled to carry a gun until the commission of his first felony; but, having done that, he is then subject to being denied the right to use those weapons again.

Finally, on June 6, 1968, shortly before the House voted overwhelmingly in favor of H.R. 5037, as amended by the Senate, Congressman Machen explained Title VII as follows (114 Cong. Rec. 16,286):

> Title VII prohibits the unlawful possession or receipt of firearms by felons, veterans who have been other than honorably discharged, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship. I believe this provision is necessary to a coordinated attack on crime and also a good complement to the gun-control legislation contained in title IV of this bill.

It seems clear from the foregoing that, as the courts of appeals in other circuits have held, Congress intended in enacting Section 1202(a)(1) to reach any possession of firearms by a convicted felon whether or

not it was specifically "in commerce or affecting commerce."[7]

To be sure, it is not clear why the "transportation" offense was qualified by the interstate commerce requirement in Section 1202(a)(1) that does not apply to "receipt" or "possession". It was for this reason that the court below found that the government's construction of the statute led to an "illogical conclusion." In the words of the court (App. 63):

> * * * Interpreting the commerce requirement to modify only the "transports" clause means that, although intrastate receipt and possession are punishable under the statute, intrastate transportation is not. Moreover if both "receipt" and 'possession" are punishable without regard to the interstate elements, the modifying clause is meaningless, since there can scarcely be "transportation," whether intrastate or interstate, without an accompanying receipt or possession. * * *

It does not necessarily follow, however, that one must possess a firearm to "transport" it within the meanings of Section 1202(a)(1); an argument can be

[7] Only Congressman Pollock appears possibly to have construed the Act otherwise, stating that (114 Cong. Rec. 16,298): "This section makes it a Federal crime to take, possess, or receive a firearm across State lines when the person involved: First, has been convicted of a crime punishable by imprisonment for a term exceeding 1 year; * * *. The overall thrust is to prohibit possession of firearms by criminals or other persons who have specific records or characteristics which raise serious doubt as to their probable use of firearms in a lawful manner. I agree with this provision and feel this title alone provides the gun legislation portion necessary under this bill, without need for enactment of title IV." The latter part of this statement is, however, consistent with the rest of the legislative history.

made that the transportation prohibition of that section includes a prohibition against causing a firearm to be transported—an act that can be effected without receiving or possessing the firearm.[8] Congress might have felt that the broader scope of the term "transports," as compared to the terms "receives" or "possesses," justified its qualification by the interstate commerce requirement.

But even if no clear rationale can be discovered for the special qualification of the transportation offense, it does not follow that the construction of Section 1202(a)(1) given by the court below should be accepted. By concentrating on what it found to be the weakness of the government's construction of the statute, the court failed to perceive that its own construction suffered from a more serious defect in that it did not take into account the provisions of Title IV of the very same act of which the present statute was a part. Senator Long in the Senate, in response to a question by the sponsor of Title IV, Senator Dodd (114 Cong. Rec. 14,774), and Congressman Machen in the House (*supra,* p. 13) both indicated that Title VII was intended to complement Title IV and was in no way

[8] Compare former 15 U.S.C. 902(e) (making it a crime for certain persons to "ship, transport, or cause to be shipped or transported" any firearm in interstate commerce) with its 1968 replacement, 18 U.S.C. (Supp. V) 922(g) (making it a crime for certain persons to "ship or transport" any firearm in interstate commerce). The Senate committee report on the 1968 legislation stated that what in substance was to become Section 922(g)—then designated as Section 922(e) in the reported bill—followed 15 U.S.C. 902(e), thus suggesting that Congress found the "cause to be shipped or transported" language of the earlier statute surplusage. S. Rep. No. 1097, 90th Cong., 2d Sess., p. 115

introduced as a substitute for that part of the 1968 Omnibus Crime Act.

Since 1961, it has been a federal crime for any convicted felon to "receive any firearm * * * which has been shipped or transported in interstate or foreign commerce" or to ship, transport or cause to be shipped or transported any firearm. 15 U.S.C. 902(e), (f).[9] These statutes were repealed and recodified in somewhat expanded form in Title IV of the 1968 Act and are now found in 18 U.S.C. (Supp. V) 922(g), (h).[10] These recodified sections make it a crime for a convicted felon[11] "to ship or transport any firearm * * * in interstate or foreign commerce" or to receive any firearm which has been so shipped or transported. Since receipt (and hence possession) of a firearm "in interstate or foreign commerce" has thus been, both prior to and after 1968, a crime punishable by imprisonment for up to five years, the construction of Section 1202(a)(1) by the court below to require an

---

[9] This statute was passed originally in 1938 limited to persons convicted of a crime of violence. See *United States* v. *Thoresen*, 428 F. 2d 654 (C.A. 9); *Reddy* v. *United States*, 403 F. 2d 26 (C.A. 1), certiorari denied, 393 U.S. 1085; *DePugh* v. *United States*, 393 F. 2d 367 (C.A. 8), certiorari denied, 393 U.S. 832.

[10] Title IV expanded the class of persons proscribed from interstate transactions in firearms to include narcotic, marihuana or other drug users and addicts, as well as adjudicated mental defectives or persons committed to a mental institution. Both former 15 U.S.C. 902(e) and (f) and their present counterparts also apply to anyone who is a fugitive from justice.

[11] In fact neither former 15 U.S.C. 902(e), (f) nor their present counterparts use the term "felon." All these statutes refer to a person convicted of a "crime punishable by imprisonment for a term exceeding one year." With only minor exceptions, the definition of "felony" in Section 1202 is identical. See Section 1202(c)(2), set forth *infra*, p. 3.

allegation and proof that the possession or receipt of a firearm by a felon was "in commerce or affecting commerce" relegates that statute to virtual redundancy. Of course under our proposed construction, the transportation prohibition of Section 1202(a)(1) would still be redundant—unless the commerce requirement were read out of the statute.[12] But, given the choice between interpreting the statute to make the entire section superfluous and interpreting it to leave a possible question of consistency as to only one clause, we submit that the latter construction is more rational; since the proscription of felons from possessing or receiving firearms contained in Section 1202(a)(1) is clearly the core provision of Title VII, Senator Long, the bill's sponsor, obviously would not have viewed his amendment as a significant addition to Title IV if it covered only the same ground as Title IV. For the foregoing reasons, we submit that the intent of Congress in Section 1202(a)(1) was, as the district court in this case concluded, to punish any possession or receipt of firearms by a convicted felon, without the need to allege or prove that the possession or receipt was in or affected interstate commerce.[13]

[12] This indeed was the construction given to the statute by one district court. *United States* v. *Davis*, 314 F. Supp. 1161, 1165–1167 (N.D. Miss.).

[13] Several Senators in questioning then Attorney General Ramsey Clark with regard to a proposal for further gun legislation shortly after the passage of Title VII, indicated their understanding that Title VII prohibited all possession of firearms by convicted felons. See *Hearings Before the Senate Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary*, 90th Cong., 2d Sess., pp. 69–70, 623–624 (June 26 and July 9, 1968).

II. CONGRESS IS AUTHORIZED UNDER THE COMMERCE CLAUSE TO PROHIBIT GENERALLY THE POSSESSION OF FIREARMS BY CONVICTED FELONS

Apart from the asserted incongruity of interpreting the "possesses" and "receives" branches of Section 1202(a)(1) differently from the "transports" aspect, the court of appeals based its construction of the statute principally upon its view that it was necessary to "avoid a reading which would create serious constitutional doubts" (App. 65).[14] But whatever doubts may have existed at the time of the decision below about the constitutionality of punishing possession, without tying it to commerce specifically, have been largely resolved by this Court's decision in *Perez* v. *United States,* No. 600, 1970 Term, decided April 26, 1971. That decision sustained the provisions of Title II of the Consumer Credit Protection Act, 18 U.S.C. (Supp. V) 891–894, 896, which punish extortionate credit transactions without requiring proof that a particular defendant's activities affect interstate commerce. Accordingly, we submit that Congress has the power under the Commerce Clause to prohibit activities which as a class affect interstate commerce

[14] Since the court below held only that a substantial constitutional question would be raised in the event the government's construction of the statute were adopted, it would not be strictly necessary for this Court to rule on the statute's validity to reverse the judgment. In view, however, of the fact that the issues of construction and constitutionality are intertwined, we urge the Court to reach the constitutional question rather than remand the issue to the court below. Every other court of appeals which has interpreted the statute in the manner we suggest has gone on to uphold its constitutionality under the Commerce Clause. See the cases cited *infra*, pp. 8–9.

without proof in individual cases that a specific act in itself affects interstate commerce; we shall also show that Congress had a rational basis for concluding that possession of firearms by convicted felons constitutes a burden on interstate commerce.

As *Perez,* slip op. at 5–6, and earlier decisions of this court make clear, the power of Congress to legislate with respect to activities affecting interstate commerce—in both regulatory and criminal statutes—encompasses the power to reach wholly intrastate activities. See *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 119; *Wickard* v. *Filburn,* 317 U.S. 111, 125; *Katzenbach* v. *McClung,* 379 U.S. 294; *Maryland* v. *Wirtz,* 392 U.S. 183. And pursuant to this power, Congress may regulate an entire class of intrastate activities if it determines that the class as a whole affects interstate commerce. See *United States* v. *Darby,* 312 U.S. 100, 120–121; *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241; *Maryland* v. *Wirtz,* 392 U.S. at 192–193; *Perez, supra,* slip op. at 6–9. Finally,

> [w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class. *Maryland* v. *Wirtz,* 392 U.S. 183, 193 [*Perez, supra,* slip op. at 9].

Under these principles, if Congress' determination that the possession of firearms by convicted felons in general affects interstate commerce is valid, then it follows that Congress had the power to prohibit *all* possessions of firearms by convicted felons without

requiring proof that each individual possession affects interstate commerce. The only remaining question, therefore, is whether Congress was justified in concluding that the possession of firearms by the designated persons constitutes a burden on interstate commerce. If that conclusion had a "rational basis" on "any state of facts either known or which could reasonably be assumed" by Congress, then the statute must be upheld. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154; *Katzenbach* v. *McClung, supra,* 379 U.S. at 303–304; *Maryland* v. *Wirtz, supra,* 392 U.S. at 189–190, n. 13.

It is not difficult to perceive a rational basis for Congress' finding in 18 U.S.C. App. (Supp. V) 1201 that firearms in the possession of convicted felons pose a threat to interstate commerce.[15] Although, as with the statutes at issue in *Perez,* no hearings were held on the instant gun control legislation and no committee reports accompanied it, Congress did have statistics on the sharp rate of increase of serious crimes during the 1960's, the high rate of recidivism among convicted felons and the number of serious crimes committed with the use of firearms.

[15] One court of appeals, in upholding the constitutionality of Section 1202(a)(1) as construed by the government, commented that no citations of authorities and statistics are necessary to support the proposition that possesssion of firearms by convicted felons adversely affects interstate commerce. *Stevens* v. *United States, supra,* p. 8, slip op. at 13. We agree that the matter is appropriate for judicial notice and submit that the legislation would be equally valid even had Congress made no findings. Cf. *Perez, supra,* slip op. at 11. But we need not rest our case there, however, for it is apparent that the legislative findings that were made had a solid foundation in empirical data before Congress.

In February 1967, for example, the President's Commission on Law Enforcement and the Administration of Justice published its report entitled *The Challenge of Crime in a Free Society*. The report cited the "very heavy economic burden upon both the community as a whole and individual members of it" imposed by crime (*id.* at 32) and estimated the yearly economic cost of homicide at $750,000,000 and of robbery, burglary, larceny and auto theft at $600,000,000. The report also noted that "[c]riminal acts causing property destruction or injury to persons not only result in serious losses to the victims or their families but also the withdrawal of wealth or productive capacity from the economy as a whole" (*id.* at 34). A chapter of the report was devoted to a discussion of the need for more effective gun control legislation, it being noted that the existing Federal Firearms Act of 1938 applied only to direct interstate shipments and did not prevent convicted felons from buying firearms locally after they had been transported from another state (*id.* at 240). The significance of firearms was underscored by a citation of statistics showing that in 1965, 5,600 murders, 34,700 aggravated assaults and the vast majority of 68,400 armed robberies were committed by means of firearms (*id.* at 239). And all but 10 of the 278 law enforcement officers murdered from 1960 through 1965 were killed with firearms (*ibid.*). Finally, the report noted the high rate of recidivism among those convicted of "the common serious crimes of violence and theft" (*id.* at 45).

That the members of the 90th Congress were well aware of the Crime Commission's report is clear. Dur-

ing 1967, extensive hearings were held on anti-crime bills, including proposed gun control legislation, and frequent references were made to the Commission's report as well as to other reports and statistics. See *Hearings Before House Subcommittee No. 5 of the Committee on the Judiciary on H.R. 5037, H.R. 5038, H.R. 5384, H.R. 5385 and H.R. 5386,* 90th Cong., 1st Sess., pp. 213, 241, 261 (testimony and statement of former Attorney General Ramsey Clark); 487–488 (table submitted by Congressman Casey showing percentage of serious crimes committed with firearms); 495 (testimony of James V. Bennett, President, National Council for a Responsible Firearms Policy). The Crime Commission's report was also considered by the Senate Judiciary Committee in connection with S. 917, the bill which was substituted for H.R. 5037 and was eventually enacted as the Omnibus Crime Control and Safe Streets Act of 1968 (see pp. 10–11, n. 4, *supra*). S. Rep. No. 1097, 90th Cong., 2d Sess. p. 31. The committee report on S. 917 cited, in a discussion of Title IV of the bill (relating to firearms shipped interstate), further statistics on the use of firearms in the commission of serious crimes, indicating significant increases in 1966 and 1967 over the 1965 figures reflected in the Crime Commission's report. *Id.* at 76. Further statistics and reports on firearms were cited in the additional views of Senator Tydings on Title IV, which accompanied the committee report. *Id.* at 190, 193–195, 203–304.

Thus, when Senator Long offered his amendment to S. 917 on May 17, 1968, he was not asking his colleagues to take on faith the amendment's proposed

finding that possession of firearms by convicted felons constituted a burden on interstate commerce; he was asking for action based on a solid record of criminal statistics which had been before Congress for over one year. Under these circumstances, Congress, in enacting 18 U.S.C. App. (Supp. V) 1202(a)(1), had a "rational basis" for concluding that convicted felons as a class should be prohibited from receiving or possessing firearms.

We submit, therefore, that Section 1202(a)(1) is not rendered constitutionally suspect by the interpretation that all possessions of firearms by convicted felons are proscribed, and that there is thus no constitutional reason to approve the restrictive construction adopted by the court below. As we have shown in Part I, the clear intent of Congress was to ban all possessions and the statute should be applied so as to implement that intent.[16]

---

[16] The court of appeals noted (App. 67) that, because of the result it had reached, it had no occasion to discuss respondent's contention that the definition of the term "felony" in Section 1202(c)(2) denied him the equal protection of the laws. Presumably this refers to an argument that the proscription against the possession or receipt of firearms by convicted felons is unreasonable as applied to a person convicted of a non-violent crime. While this issue is not presented in this Court, we point out that every court of appeals that has considered it has held that Section 1202(a)(1) is not irrational as to a person convicted of a non-violent crime. *United States* v. *Synnes*, *supra*, 438 F. 2d at 771–772; *United States* v. *Karnes*, 437 F. 2d 284 (C.A. 9), pending on a petition for a writ of certiorari, No. 1545, this Term. The same result was uniformly reached as to the similar provisions of former 15 U.S.C. 902(e). See *Williams* v. *United States*, 426 F. 2d 253 (C.A. 9), certiorari denied, 400 U.S. 881; *United States* v. *Thoresen*, 428 F. 2d 654 (C.A. 9).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

SAMUEL HUNTINGTON,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

JUNE 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971